

Society of Environmental Journalists

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FAX TRANSMITTAL

Comments Submitted for the Record on
DHS Environmental Planning Directive (69 FR 33043)

TO:

David Reese
Environmental Planning
Office of Safety and Environment
Management Directorate
Department of Homeland Security
Anacostia Naval Annex
Building 410
245 Murray Lane, SW.
Washington, DC 20528.
By Fax to: (202) 772-9749

DATE: July 14, 2004

Dear Mr. Reese:

Please find attached a set of comments submitted by the Society of Environmental Journalists for the record on the Department of Homeland Security's Proposed Environmental Planning Directive (69 FR 33043, June 14, 2004). We understand that by faxing these comments to you today, according to instructions published in the Federal Register, we have filed them in a timely manner.

The attachment consists of seven (7) pages, NOT including this cover sheet.

If there is any problem in transmission or you have any questions about our submittal, please feel free to call me at (301) 656-2261.

Sincerely,

Joseph A. Davis, Ph.D.
Director, SEJ Watchdog Program

July 14, 2004

TO:

David Reese
Environmental Planning
Office of Safety and Environment
Management Directorate
Department of Homeland Security
Anacostia Naval Annex
Building 410
245 Murray Lane, SW.
Washington, DC 20528.
By Fax to: (202) 772-9749

FROM:

The Society of Environmental Journalists
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RE: Department of Homeland Security Environmental Planning Directive

The Society of Environmental Journalists submits these comments to the Department of Homeland Security in response to its "Environmental Planning Program -- Notice of Proposed Directive; request for comments," published in the *Federal Register* on June 14, 2004 (69 FR 33043, pp. Page 33043-33066).

Our comments focus especially on information disclosure restrictions described under Section 6.2 ("Classified or Protected Information").

The Society of Environmental Journalists (SEJ) is the world's largest and oldest organization of individual working journalists covering environmental issues. Founded in 1990 and based in Jenkintown, Penn., SEJ consists of more than 1,300 journalists, educators and students dedicated to improving the quality, accuracy and visibility of environmental reporting. SEJ's programs include annual and regional conferences; a daily environmental news service; a quarterly magazine; a biweekly story tip sheet; an annual journalism contest; a comprehensive Web site; eight e-mail listserves; a diversity program and a mentoring program.

Working through its First Amendment Task Force and Watchdog Program, SEJ addresses freedom of information, right-to-know, and other news-gathering issues of concern to journalists reporting on environmental topics.

Adequacy of Notice and Comment Period

We are very concerned that the Department is proposing to broaden restrictions on public

access to information beyond those intended or authorized in the law. The environmental consequences of actions by vast array of agencies under the administrative umbrella of the Department of Homeland Security are many. The proposed environmental planning directive is a 60-page document dealing with a subject of considerable legal complexity, and the 30-day comment period is especially short.

Moreover, we feel that notification of interested stakeholders has been inadequate, and that publication in the *Federal Register* alone is not enough for a directive of such consequence. The Council on Environmental Quality's (CEQ) 1978 NEPA regulations (40 CFR 1506.6, "Public involvement") require agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures" and define a diligent effort "In the case of an action with effects of national concern" as including "notice by mail to national organizations reasonably expected to be interested in the matter." SEJ believes it is such an organization, and SEJ received no such notice. We think that there is a substantial number of other interested national organizations who may not have received direct mail notice, either.

In accordance with that section of the regulations, SEJ herewith formally requests to be notified directly by mail on all environmental planning matters emanating from DHS.

Since the comment period is too short to allow groups like ours to perform adequate analysis of the proposal, and since the notice was insufficient, **we urge DHS to extend the comment period for another 60 days, and to notify directly a wider range of national stakeholder groups. We believe a public meeting in Washington, D.C., would provide an excellent venue for public involvement in this important decision, and urge DHS to convene one.**

General Comments

Public disclosure of information is the heart and soul of the National Environmental Policy Act (NEPA). This approach is based on fundamental constitutional principles and a shared national philosophy about the role of government under democracy. Not all Americans agree all of the time about whether prescriptive regulations are the best way for government to intervene for social good (specifically, environmental protection). But the approach to government that seeks to minimize regulatory intervention depends even more on openness. Government cannot act appropriately, tailoring its actions to suit specific problems, without the sunlight of public information, public accountability, and sometimes public pressure. NEPA depends on these things to guide government action properly.

Consequently, any legal, regulatory, or administrative provisions which limit disclosure of NEPA-related information need to be evaluated with strong skepticism and restricted to the narrowest scope which will accomplish any legitimate purpose. To give the agency a blank-check authority to declare information secret, without appeal or oversight, and indeed without even having to make the case justifying doing so, or provisions for

making the public aware that it has done so, has the effect of directly undermining NEPA and the bedrock principle of open government accountable to the citizenry. SEJ believes that the DHS Directive as proposed (along with the authorities it relies on), makes no provision for needed limits, checks, and balances on DHS secrecy authority. The directive should be reworked to add such mechanisms before it is finalized.

We urge the Department to remember that several important public purposes are served by giving the public the broadest feasible access to information about hazards to environmental health and safety. While a new caution is certainly indicated in light of the September 11, 2001, attacks, that is not the only lesson to be remembered. The 1984 Bhopal tragedy showed that thousands of people were killed, not merely by industrial hazards, but actually by their unawareness of the threat the Bhopal plant presented to their lives and health. Many major environmental laws actually require disclosure of hazard information, and the important public policy reasons for this remain valid. Far more people in the United States have died from dam failures, fuel explosions, chemical accidents, pipeline failures, and other preventable hazards than from terrorism. But these deaths are only preventable if the public is aware of the hazards and government acts to provide real safety rather merely than to hide the hazards.

The press plays a crucial role in alerting the public to the dangers they may face. We believe that, without openness, the press will be hampered in its vital purpose of giving citizens the environmental, health and safety information that individuals need to function effectively in a democracy and make good decisions about their lives, personal and civic. We enumerate our concerns more fully in the specific comments below.

Conflict Between Laws, Regulations, and Directives

SEJ believes there are some fundamental conflicts between this directive and laws like the National Environmental Policy Act and the Freedom of Information Act (which mandate public disclosure). SEJ does not believe these conflicts have been adequately addressed or resolved.

While case law and government experience on FOIA and the National Security Classification system go back for decades, the same cannot be said about some of the other more recently defined and asserted categories of information secrecy -- Critical Infrastructure Information (CII), Sensitive Security Information (SSI), Sensitive But Unclassified (SBU), For Official Use Only (FOUO), etc. The legislative and executive branches of government have been rapidly expanding these secrecy categories in recent years, but to date there has been only the most limited testing of their validity and reach in court. In short, they may make a shaky foundation on which to build a structure of further secrecy claims -- as DHS is doing with this directive. There is no way to predict a consistent outcome once the department's action collides with the Constitution and the Bill of Rights, other laws, the legal mandates of other federal agencies, or for that matter the authorities of state, local, and tribal governments.

Only information that falls within an exemption to the Freedom of Information Act can be withheld from FOI requesters. The Department cannot by regulation create new exemptions to the FOI Act. Some, but not all, of the information described in Section 6.2 of the Proposed Directive will be exempt from disclosure under the the FOI Act; for instance, the Homeland Security Act includes a provision protecting critical infrastructure information and that information is covered by Exemption 3 to the FOI Act which protects against disclosure of information that is clearly confidential under other laws. There is, however, no law that prohibits the release of all information marked "sensitive but unclassified."

SEJ would like to see in the body of the directive itself some strong statement of presumption in favor of openness. It is equally important that the directive include more details of the criteria that must be met in the limited number of cases when secrecy should prevail over openness. We would also like to see specific procedures for resolving conflicts and disputes between the two interests -- openness and secrecy. While the Council on Environmental Quality's role in this regard is an important one, its authority may not be sufficient to resolve all the issues that come up.

As an agency "directive," the current proposal may actually have little force beyond whatever laws, regulations, and executive orders it is derived from. It cannot create new authority for secrecy -- although it seems to us that it tries to do this in the case of NEPA. We fear that the directive's assertion of secrecy may in some places be flatly contradicted by the requirements NEPA and FOIA.

One way to make these issues available for resolution by the courts would be to withdraw the current directive and re-propose it as a rulemaking. That way courts and other bodies could begin to address and resolve the inherent conflicts and contradictions.

Specific Comments

1. (Proposed Directive Section 6.2.A.) The list of legal and regulatory authorities cited for asserting secrecy includes "other laws, regulations, or Executive Orders prohibiting or limiting the release of information." This is unacceptably vague. If there are other specific authorities which DHS is claiming, it should name and specify them. If there are not, this language should be eliminated. Unnamed authorities are no authorities at all -- merely loopholes providing opportunity for future expansion of secrecy claims.

2. (Proposed Directive Section 6.2.C.) The directive should specify that, when it is necessary to segregate and not disclose particular information in a NEPA document, that the public document specifically mention and list in the table of contents the undisclosed appendices, and explain the general scope of information they contain, and the general reasons why they need to remain undisclosed.

3. (Proposed Directive Section 6.2.C.) The directive should clarify who the "appropriate reviewers and decision makers" are who will review the undisclosed sections of NEPA

documents. Specifically, in cases where the secrecy authority is not derived from the National Security Classification system, who is allowed to see this information? -- and who decides who is allowed to see it? Most important is the question of whether the reviewers will include officials from agencies outside of DHS -- as NEPA and its implementing regulations mandate. What happens if the other agencies disagree with DHS on the need for secrecy? What requirements will be placed on the DHS and non-DHS officials, or outside experts, who may be asked to review unclassified information which is kept from disclosure? What are the penalties for disclosure and what are the protections for whistleblowers? What are the rules, if any, under which non-governmental reviewers may be allowed to see the withheld information?

4. (Proposed Directive Section 6.1.G.) The section on public affairs planning for emergencies is an important one and DHS is to be commended for including it. However, SEJ would like it to include much more specific detail prescribing or recommending what "open communication" amounts to. Advance preparation is a large part of the solution to communication in emergencies.

5. (Proposed Directive Sections 6.2B and C.) The two sub-sections imply that "protected information" may be treated similarly in the CEQ NEPA regulations as classified proposals. That is incorrect and is a significant misreading of the CEQ regulations.

The CEQ regulations contain provisions that allow an agency the option to provide "limited exceptions to the provisions of these (CEQ) regulations for classified proposals. 40 CFR 1507.3(c). The CEQ regulations also state that "these documents (EISs and EAs) may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public."

The CEQ regulations make no provision for "protected information" or any other category of information, except "classified proposals." Under NEPA, the content of "protected information" in the DHS directive cannot be excluded from public review. Because "protected information" does not meet the same standard as classified information, it therefore, is not subject to the limitations allowed in 40 CFR 1507.3(c). Further, DHS's proposed exclusion of "protected information" from the provisions of NEPA could result in the exclusion of environmental impacts and alternative means to reduce those impacts from public involvement in the NEPA process.

To ensure compliance with the CEQ regulations in 40 CFR 1507.3(c), the phrase "or protected information" must be deleted from DHS's language 6.2B and C.

6. Categorical Exclusions (Proposed Directive, Table 1.0). As is mentioned in the Background section of the Proposed Directive, DHS has derived its list of proposed Categorical Exclusions (CEs) from legacy CE's of component agencies. It would help commenters in evaluating this proposal if DHS could make available the information it says it has regarding the legacy CE's behind Table 1.0. Without this information, SEJ (and the public) cannot determine the degree to which the Proposed Directive would be an expansion of pre-existing authorities.

The list of CEs is a large and broad one. SEJ is concerned that granting of a CE not become a justification for denying the public whatever information DHS may possess about some of these activities and their environmental consequences. DHS should add a statement that the existence of a CE does not constitute justification for denying public requests for information. Specific examples in Table 1.0 include:

-- A7(e) "Chemicals and low level radio nuclides for analytical testing and research" -- Without betraying security secrets, DHS ought to be able to document or be accountable for such agents being handled safely.

-- A8(a) "Activities designed to support the improvement or upgrade management of natural resources" Since these activities are all presumably benign, it should be possible for the public to ask for and get information on them.

-- A8(c) "Site characterization studies and environmental monitoring...." It is not entirely clear what this refers to. If it pertains to the location of air monitoring devices, however, the current level of secrecy is unjustified -- as it has a huge impact on the Environmental Protection Agency's (and states') current ambient air quality monitoring programs. The public has a right to information about the effectiveness of air monitoring, resulting data, and adequacy of funding for it.

-- A8(d) "Vulnerability, risk, and structural integrity assessments of infrastructure," while security may justify some secrecy in this area, it should not be blanket. For example, if a bridge is failing structurally because of age or poor maintenance, the public has a right to know this in order to ensure that government fixes the bridge. Fear of terrorism should not be a mechanism for hiding the government's neglect of its duty to keep the public safe. Again, this exclusion comes up far short by failing to establish a balancing act and some kind of standards to be followed in keeping information secret.

-- B13 (Tree removal). The public has a right to know about these activities, which are not always minimal, in order to know that they are justified.

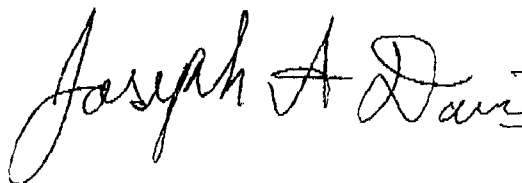
The above are only a few specific examples. Many other items in Table 1.0 have significant environmental consequences, which, while they may not justify a full NEPA consideration, should be a matter of public record.

7. (Proposed Directive Section 6.3, "Procedures for Applicants") While it may be obvious, SEJ would be reassured if the directive stated explicitly that applicants for "permits, grants, various certifications, awards, licenses, approvals, or other major federal actions" could not ask for protection as Critical Infrastructure Information (CII) for any of the information submitted in support of their application or attendant NEPA documentation, because such information would no longer be "voluntarily submitted." This would not pre-empt the applicant from claiming protection for specific confidential or proprietary business information.

We are grateful for the opportunity to comment on this proposed rule, but urge you to extend the comment period in order to get adequate public involvement in this crucial set of decisions.

Respectfully submitted,

Joseph A. Davis
Director, SEJ Watchdog Program

A handwritten signature in black ink that reads "Joseph A. Davis". The signature is written in a cursive, flowing style.

for SEJ on behalf of himself and

Ken Ward Jr.
First Amendment Task Force Chair

Robert McClure
SEJ Board Liaison

Dan Fagin
President